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Nos. 00-568 and 00-809

In The

Supreme Court of the United States

People of the State of New York and the Public Service Commission of the State of New York, et al.
Petitioners,

v.

Federal Energy Regulatory Commission, et al.,
Respondents.

Enron Power Marketing, Inc.,
Petitioner,

v.

Federal Energy Regulatory Commission, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE STATE PUBLIC SERVICE COMMISSIONS AS RESPONDENTS ON THE MERITS IN 00-809

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QUESTION PRESENTED IN NO. 00-809

Whether the District of Columbia Circuit correctly affirmed a Federal Energy Regulatory Commission (FERC) decision that it lacked jurisdiction under the Federal Power Act (FPA) subchapter 2, 16 U.S.C. §§ 824, et seq., to regulate the transmission of electric energy "bundled" (i.e., combined) with retail electricity?

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PRELIMINARY STATEMENT

Enron[1] challenges FERC's[2] conclusion that FERC lacks jurisdiction to regulate bundled retail transmission service. In effect, it claims that FERC has misread the FPA since its enactment in 1935.

Enron's position is baseless. The 1935 Congress denied FERC jurisdiction of all elements of retail service (FPA § 201), which included the delivery of energy. Public Utility Holding Companies, Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, testimony of FERC Solicitor DeVane ("DeVane") at 556. The 1992 Congress, in enacting FPA § 212(h) (discussed below) reaffirmed state jurisdiction over retail transmission and left decisions on whether to allow retail competition to the states.

A. Enactment Of The Federal Power Act

In 1935, Congress passed the FPA. Its purpose was to fill a jurisdictional gap created by a Supreme Court decision barring states from regulating rates of wholesale energy sold across state lines. Public Utilities Comm'n of Rhode Island v. Attleboro Steam and Electric Co., 273 U.S. 83, 89 (1927). Because, with the absence of state regulation, there was no regulation of interstate sales, Congress filled this

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[1] "Enron" refers to Enron Power Marketing, Inc., petitioner in 00-809. Enron is supported by the Electric Power Supply Association (EPSA) and Electricity Consumers Research Council (ECRC), which essentially repeat Enron's arguments.

[2] The Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, will be referred to as "FERC."

"Attleboro gap" by empowering FERC to regulate wholesale electricity rates. Congress, however, preserved the states' regulation over retail matters by providing that "Federal regulation is to extend only to those matters which are not subject to regulation by the States" (emphasis added) (§ 201(a)).

Beginning in the late 1970's, new entrants into the generation market sought access to transmission lines in order to make bulk sales. Joint Appendix ("J.A.") 74-77, Enron Appendix ("App.") 152a-154a, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities, Order No. 888 [1991-96 Reg. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), ("FERC Order 888") at 31,643-44. Congress eventually responded in the Energy Policy Act of 1992 (EPAct) by giving FERC greater authority to require transmission owners to provide transmission service to power suppliers competing with utilities. 16 U.S.C. §§ 824j-824m.

While the statute clarified FERC's authority to order utilities to provide wholesale transmission service, it also "prohibited FERC from forcing utilities to engage in 'retail wheeling,' the transmission of power directly to a retail customer." House Comm. on Energy and Commerce, Energy Policy Act of 1992, P.L. 102-486, House Report No. 102-474(I) at 140 (1992), reprinted in 1992 U.S.C.C.A.N. 1953, 1963. Thus, it directed that "[n]othing in this subsection [§ 212(h)] shall affect any authority of any State or local government under state law concerning the transmission of electric energy directly to an ultimate consumer."

B. FERC's Decision

In the decision under review, FERC decided open access to transmission was necessary to advance competition in the wholesale power market. J.A. 48, Enron App. 131a, FERC Order 888 at 31,634. In addition to requiring wholesale open access, FERC preempted the states' jurisdiction of retail transmission when states "unbundle" the commodity from delivery (presumably to implement retail competition). It, however, recognized traditional state control over bundled retail transactions.

Thus, in Order 888, FERC adhered to established practice with respect to bundled service and acknowledged that Congress did not alter state regulation of all aspects of bundled retail service. J.A. 349-50, Enron App. 306a, FERC Order 888 at 31,781. On rehearing, FERC adhered to its position that it would not attempt to unbundle retail service. Enron App. 455a, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Standard Costs by Transmitting Utilities, Order No. 888-A [Reg. Preambles] III F.E.R.C. Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274 (1997), ("FERC Order 888-A") at 30,225-226, citing FERC Order 888 at 31,781, J.A. 349-50.

C. The D.C. Circuit's Decision

On June 30, 2000, a Panel of the D.C. Circuit upheld FERC's decision not to preempt state regulation of bundled retail transmission service. Transmission Access Policy Study Group v. Federal Energy Regulatory Comm'n, 225 F.2d 667, 692-95 (D.C. Cir. 2000).

SUMMARY OF ARGUMENT

The State Petitioners' brief on the merits demonstrated that FERC Order 888 erred in assuming that the 1935 Congress: (1) failed to safeguard state regulation of the transmission portion of retail deliveries; (2) assigned FERC jurisdiction of unbundled retail transmissions in interstate commerce; and (3) provided that all retail transmissions on the interconnected grid would be in interstate commerce (State Petitioners at 10). Point I of Enron's brief combines (and expands) FERC's first two premises by contending that the 1935 Congress not only failed to deny FERC jurisdiction over matters regulated by the states, but removed jurisdiction of even bundled retail transmission jurisdiction from the states and gave it to FERC (Enron Brief as Petitioners in 00-809, hereafter "Enron" at 21-24). Enron's Point I -- that the 1935 Act preempted state regulation of retail transmission in interstate commerce -- is answered in Point I, below.

The second Point of Enron's brief claims that all retail transmissions on the interconnected grid are in interstate commerce (Enron at 27-33).[3] Point II below addresses Point II of Enron's brief.

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[3] This part of Enron's brief echoes FERC's third premise.

POINT I

THE 1935 CONGRESS DID NOT TRANSFER JURISDICTION OVER RETAIL TRANSMISSION SERVICE FROM THE STATES TO FERC

A. The Federal Power Act And Its Legislative History Rebuff Enron's Claim That The 1935 Congress Intended To Prevent State Regulation Of Retail Transmission

1. The FPA's Language Defeats Enron's Contention That FERC Has Had Jurisdiction Over All Retail Transmissions Since 1935

Enron's argument for FERC jurisdiction over transmissions in bundled retail rates ignores the FPA's goal of limiting federal regulation "to those matters which are not subject to regulation by the States." FPA § 201(a) [16 U.S.C. § 824(a)]. In giving FERC authority over matters the states could not regulate, Congress protected the states' jurisdiction over matters they could regulate, specifically retail transactions.

Neither Attleboro nor any other case law has even remotely suggested that state regulation of bundled retail transactions runs afoul of the Commerce Clause. To the contrary, Northern States Power Co. v. Federal Energy Regulatory Comm'n, 176 F.3d 1090, 1096 (8th Cir. 1999), rehearing denied, 1999 U.S. App. LEXIS 23493 (8th Cir. 1999), cert. denied sub nom., Enron Power Marketing v. Northern States Power Co., 528 U.S. 1182 (2000), held that FERC's "attempt to regulate the curtailment of electrical

transmission on native/retail consumers is unlawful, because it falls outside of the FPA's specific grant of authority to FERC." See General Motors Corporation v. Tracy, 519 U.S. 278, 294 (1997) [state can distinguish between bundled utility service and unbundled supply of gas in levying taxes].

As indicated in the State Petitioners' brief on the merits in Case 00-568 (at 27-28), Section 201(a) provides that "Federal regulation [is] . . . to extend only to those matters which are not subject to regulation by the States." Section 205 limits FERC's transmission authority by stating that it may set the rates for transmission "subject to the jurisdiction of the Commission. . . ." (emphasis added). Section 206(d) implicitly recognizes the states' jurisdiction over retail transmission by contrasting FERC's broad jurisdiction over transmission facilities with its lack of jurisdiction over retail service and calling on FERC to provide costs to states in order to facilitate state regulation of retail transmission service. See H.R. Rep. No. 74-1318, at 8 (bill takes no authority from States and authorizes FERC "to aid the State commissions in their efforts to ascertain and fix reasonable charges").[4]

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[4] Public Utility Holding Company Act of 1935, Hearings Before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong. (1935) ("1935 Hearings on S. 1725") at 245, 247 (Memorandum of FERC Solicitor DeVane, "Analysis of Wheeler Bill, S. 1725, pp. 104 to 140") ["It cannot be too strongly emphasized that the ratemaking power conferred on the Commission by Sections 207 and 208 is limited to the field in which States have no constitutional authority. Under the provisions of this title, the power of the States to regulate retail distribution rates, even where the energy comes directly from another State is expressly preserved; wholesale rates alone are made the subject of the Commission's jurisdiction"].

Enron's position also flies in the face of EPAct. FPA § 212(h) [16 U.S.C. § 824k(h)] provides that "[n]othing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer."[5] If, as Enron claims, Congress meant to give FERC jurisdiction over all transmission, it would not have reserved to the states decisions on whether to allow transmissions directly to retail customers. Moreover, it would not have denied FERC authority to require unbundling of retail transactions.[6]

2. The FPA's Legislative History Demonstrates That Congress Preserved State Jurisdiction Over All Retail Deliveries

The legislative history of the 1935 Act evidences Congress' goal of filling the Attleboro gap, which prevented states from regulating wholesale electricity sales in interstate commerce while -- at the same time -- preserving state regulation of retail electric service, including retail transmissions (State Petitioners' Br. at 18-26). In claiming

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[5] Section 212(h)'s legislative history states that "[t]he bill's electricity provisions will promote additional competition in wholesale electricity power market in order to improve the efficiency of the electric utility industry and secure the lowest possible costs for consumers" (emphasis added). Energy Policy Act of 1992, P.L. 102-486, House Report No. 102-474(I) at 138 (1992), reprinted in 1992 U.S.C.C.A.N. 1953, 1961.

[6] Section 212(h) states "no order issued under this chapter shall be conditioned upon or require the transmission of electric energy: (1) directly to an ultimate consumer, or (2) to or for the benefit of an entity if such electric energy would be sold by such entity directly to an ultimate consumer . . ." [16 U.S.C. § 824k(h)].

that Congress intended to grant FERC plenary authority over retail transmissions in interstate commerce, Enron has selected four items from the legislative record, none of which support its theory (Enron at 23-25).

First, Enron cites the Senate Report on Section 201, which stated "[j]urisdiction is asserted ... over all interstate transmission lines whether or not there is a sale of the energy carried by those lines . . . ." (Enron at 23; quoting S. Rep. No. 74-621, at 48 (1935)). Immediately preceding the quoted language, however, the Senate Committee on Interstate Commerce stated that Section 201(b)

> leaves to the States the authority to fix local rates even in cases where the energy is brought in from another State. . . . The present bill carefully refrains from asserting Federal jurisdiction over these rates. The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in Public Utilities Commission v. Attleboro Steam & Electric Co. (271 U.S. 83), to be beyond the reach of the States.

S. Rep. No. 74-621, at 48 (1935). Thus, Section 201(b) does not authorize FERC to regulate retail transmissions.

Second, Enron argues that Congress' failure to adopt an amendment to Section 201(b), offered by the National Association of Railroad and Utility Commissioners (NARUC), that would have limited federal jurisdiction "to the transmission and sale at wholesale of electric energy in interstate commerce," suggests that Congress intended FERC to regulate all transmission service (Enron at 23). Enron's

position is similar to that of a respondent-intervenor in Louisiana Public Service Comm'n v. Federal Communications Comm'n (FCC), 476 U.S. 355, 377 (1986), wherein GTE contended that Congress' rejection of anti-preemption language in the Communication Act's depreciation provision (47 U.S.C. § 220) demonstrated Congress' intent to allow FCC preemption of local depreciation charges. Just as GTE's argument ignored Congress' enactment of Section 152(b) of the Communications Act, which preserved state jurisdiction over intra-state telecommunication matters, Enron's contention ignores Congress' enactment of Section 201(a) of the FPA, which preserved pre-existing state regulation over retail matters.

In negotiating the 1935 FPA, as well as the 1934 Communications Act, the states were not wedded to particular language. Their sine qua non for the FPA was that the statute preserve pre-existing state jurisdiction. Thus, on the same day that NARUC offered its version of Section 201(b) it also successfully urged Congress to amend Section 201(a) to provide that "nothing contained in this title shall be construed to extend Federal regulation to that part of said business which is subject to regulation by the States."[7] See Public Utility Holding Cos. Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5423 ("1935 Hearings on H.R. 5423"), 74th Congress (1935) (statement of

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[7] Section 201(a), as enacted, allows "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Mr. Benton stated that such language should "be incorporated as a clear declaration by Congress of its intent to grant the power to the Federal body to regulate that which is beyond the jurisdiction of the local commission" (emphasis added). 1935 Hearings on H.R. 5423 at 1677.

John E. Benton, General Solicitor of NARUC), at 1660. Because the states regulated retail transmission in 1935, preserving pre-existing state regulation would safeguard state regulation of retail transmissions. See Benton, 1935 Hearings on S. 1725 at 767-68, 1935 Hearings on H.R. 5423 at 1657; DeVane, 1935 Hearings on H.R. 5423 at 498 ["The theory upon which the bill is drawn is that the consumer's rate is left to regulation by state commissions."]

Congress accepted § 201(a) and thereby preserved pre-existing state regulation "even in those cases where the energy is brought in from another State" (H.R. Rep. No. 74-1318 at 27 (1935)). Although FERC opposed NARUC's original version of § 201(b) limiting federal jurisdiction to those utilities that transacted the majority of their business in interstate commerce (because it could have impeded FERC's ability to facilitate interconnections) (DeVane, 1935 Hearings on H.R. 5423 at 2144-2149), it supported § 201(a), acknowledging that Section 201(a) limited FERC's rate jurisdiction to wholesale transactions in interstate commerce (DeVane, 1935 Hearings on H.R. 5423 at 497-498, 518) and noted that it did not wish to regulate retail matters.[8] The states, in turn, supported the FPA because Section 201(a), among other things, safeguarded their jurisdiction over all elements of retail service. See Jersey Central Power & Light Co. v. Federal Power Comm'n, 319 U.S. 61, 74 (1943) [§ 201(a) preserves state regulation over "generation, transmission and sales" to retail customers] (emphasis added).

Enron's third selection of legislative history is a statement by Mr. Arkwright, the then-President of Georgia

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[8] DeVane, 1935 Hearings on H.R. 5423 at 2143, 2144, 2146, 2154.

Power Company. Mr. Arkwright stated that "[w]hether it be wholesale or retail, as I understand it, the transmission of the current from one State to another is interstate commerce" (Enron 23-24). 1935 Hearings on H.R. 5423 (statement of John Preston Arkwright), at 661. He then went on, however, to offer his opinion that:

> electric current distributed is subject exclusively to the jurisdiction of the State for regulation, no matter where the current came from, whether it had been transmitted across State lines or not.

Id. at 666.

Last, Enron argues that the House and Senate committee reports confirm that FERC's jurisdiction over transmission in interstate commerce should include transmission for bundled retail transactions (Enron at 25). The committee reports confirm the opposite -- that Congress understood that the states would have jurisdiction over retail transmissions.

The House Report states that "the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State." H.R. Rep. No. 74-1318 at 27 (1935). If the House Committee on Interstate and Foreign Commerce had intended to grant FERC jurisdiction over retail transmission, it would not have declared, in the face of the states' then long-standing role in deciding retail electric matters, that "[t]he bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges." Id. at 8. Indeed, the Committee mused that "[p]robably, no bill in recent years has

so recognized the responsibilities of State regulatory commissions as does title II of this bill." Id. at 8.

Likewise, the Senate Committee on Interstate Commerce reported that the FPA was designed to fill the gap in the regulation of interstate wholesale sales created by the Attleboro case (S. Rep. No. 74-621, at 17) and to provide FERC jurisdiction over "interstate transmission where there is no sale." Id. at 19. Rather than asserting jurisdiction over retail transmission, the Senate report eschews "every encroachment upon the authority of the States. The revised bill would impose regulation only over those matters which cannot effectively be controlled by the States." Id. at 18.

3. All Relevant FPA Case Law Refutes Enron's Position

Enron and its supporters (ECRC and EPSA) essentially claim that FERC has misread the FPA for more than 65 years. Case law under the FPA indicates otherwise. Federal Power Comm'n v. Southern California Edison Co., 376 U.S. 205, 212-15 (1964) [There is a "bright line" between state power over retail transactions and federal power over wholesale transactions].[9]

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[9] Enron basically reiterates the contentions rejected by the Circuit Court of Appeals in Northern States Power, 176 F.3d at 1090. Specifically, Enron again claims that Federal Power Comm'n v. Louisiana Power & Light, 406 U.S. 621 (1972) supports FERC jurisdiction over bundled retail transmission (Enron at 8, 17, 22-24) and that FERC must regulate the retail transmission element of bundled retail service in order to correct alleged discrimination against wholesale competitors (Enron, 39-43) (Compare Enron Reply Brief In Support of Petition for Certiorari, at 6-7 in Enron Power Marketing Inc. v. Northern States Power Co., Supreme

This Court has emphasized that the purpose of the FPA was to "adopt the test developed in the Attleboro line, which "denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale 'at local retail rates to ultimate consumers. (emphasis added)'"; [citation omitted]. FPC v. Southern Cal. Edison Co., 376 U.S. at 214. United States v. Public Utilities Comm'n of California, 345 U.S. 295, 308 (1953) ["Congress interpreted [Attleboro] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power"].

Enron argues (Enron at 8, n. 8) that the wholesale/retail demarcation of FPC v. Southern California Edison Co. applies only to "sales."[10] FPC v. Southern California Edison and Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 380 (1983) held, however, that the wholesale/retail line is a mechanistic dividing line between state and federal jurisdiction.[11]

Court No. 99-916).

[10] By "sales," Enron apparently refers to the provision of energy. A retail transaction involves the provision and sale of the commodity, transmission, distribution, metering and billing service.

[11] FPC v. Southern California Edison Co., 376 U.S. at 215-16 ["Congress meant to draw a bright line easily ascertained between state and federal jurisdiction, making unnecessary such case-by-case analysis"]. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 380 (1983) ["Congress, partly to avoid 'drawing the precise line between federal and state power by the litigation of particular cases' ... had adopted the 'mechanical' line established in Kansas Gas and Attleboro as the statutory line

Further, Enron argues (Enron at 26-27) that the FERC retail transmission price should be an element of the retail rate, citing the holding of Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986), that a state regulator should recognize a FERC-approved wholesale rate. Nantahala recognized FERC's "exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers" (emphasis added). 476 U.S. at 966. It did not, however, permit FERC to set a bundled retail rate. Rather, Nantahala held that states must recognize FERC wholesale rates, and FERC allocations of wholesale power as costs, in setting retail rates. 476 U.S. at 971.[12]

B. Enron's Reliance On NGA Case Law Is Misplaced

Enron and EPSA reference (Enron at 17, 22, 32; EPSA at 6) case law under the Natural Gas Act (NGA) for the proposition that FERC, not the states, must regulate the transmission component of a bundled retail transaction. Enron claims that the Court has followed an "established practice of citing interchangeably decisions interpreting the

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dividing federal and state jurisdiction"]. If such a mechanical line is to have its intended benefits of simplifying jurisdictional controversies, it must apply to the statute as a whole.

[12] EPSA argues (EPSA Brief "EPSA" at 12-13) that FPC v. Conway Corp., 426 U.S. 271 (1976), supports FERC power over retail services insofar as that case concluded FERC had jurisdiction to address a "price squeeze" between retail and wholesale rates. Inasmuch as FPC v. Conway Corp. held FERC could not adjust a retail rate, it supports the States' position in this case. 426 U.S. at 276-77. FERC could consider the difference between wholesale and retail rates, but it could only do so in setting the wholesale rate. 426 U.S. at 280.

pertinent sections of the two statutes" (Enron at 22, citing Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577, n. 7 (1981)), but that practice is apparently followed, however, only when the "relevant provisions of the two statutes 'are in all material respects substantially identical (emphasis added).'" 453 U.S. at 577, n. 7, citing Federal Power Comm'n v. Sierra Power Co., 350 U.S. 348, 353 (1956). The Natural Gas Act contains no "relevant" provision similar to FPA Sections 201(a) or 212(h).

Enron chiefly relies on Federal Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621 (1972), which held that FERC could curtail interstate transportation of natural gas to industrial customers, although the transportation was occurring in association with non-jurisdictional direct sales of natural gas. 406 U.S. at 640-41. The case is not supportive of Enron's position for several reasons.

First, it did not concern NGA § 1(c), 15 U.S.C. § 717(c), which provides that where a gas buyer and seller are in the same state, FERC does not have jurisdiction over retail deliveries. ["The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and services of such person or facilities be subject to regulation by a State commission"].[13] Second, Federal Power

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[13] We anticipate Enron will argue that the existence of NGA § 1(c) supports its position because such a provision was not included in

Comm'n v. Louisiana Power & Light did not concern NGA § 7f(2), 15 U.S.C. § 717f(2), which denies FERC jurisdiction over service across state lines to retail consumers if the transportation is in the utility's service territory.[14] ["[T]ransportation to ultimate customers in such service area by the holder of such service area determination, even if across state lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed"]. Third, as indicated, the NGA does not contain a corollary to either FPA § 201(a) or § 212(h), which-again-deny FERC jurisdiction over retail transmissions.

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the Federal Power Act. However, such an argument would ignore the fact that FERC had repeatedly argued that the addition of any amendment like NGA § 1(c) to the Federal Power Act was unnecessary because the Federal Power Act adequately protected state authority over retail rates and local services. Amendments to Federal Power Act, Hearings on H.R. 2972 before the House Committee on Interstate and Foreign Commerce, 80th Cong. (1947) at 336 (statement of FERC Chairman Smith) 527, 548, 574-75 (statement of FERC Assistant General Counsel Wahrenbrock). Federal Power Act Amendments of 1967, Hearings on H.R. 5348, H.R. 5637, H.R. 7799, H.R. 8426, H.R. 8919, H.R. 9174 before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 90th Cong. (1967) at 123-125 (statement of FERC Chairman White).

[14] Electric utilities sell electricity to retail customers in their service territories.

C. Enron's Contentions That FERC Has Violated Section 206 By Not Preempting State Regulation Of Retail Transmission Service And Thereby Created A Regulatory Gap Are Misplaced

Enron and ECRC allege that Section 206 requires FERC to regulate retail transmission service because the States are unable to prevent vertically integrated utilities from providing retail transmission service in a manner that prejudices wholesale competitors (Enron at 31-32, ECRC Brief ("ECRC") at 12-13). Its position misconstrues Congress' intent in enacting Section 206 and ignores the states' demonstrated ability to prevent discriminatory utility behavior.

1. Section 206 Was Not Intended To Authorize, Much Less Require, FERC Preemption Of Retail Transmission Service

Section 206(a) allows FERC, on its own motion, to examine whether utility rates "subject to the jurisdiction of the commission" are discriminatory and, if so, to rectify such discrimination. Subdivision (d) of Section 206 recognizes state authority to set transmission rates and empowers FERC to assist state ratemaking by providing states, upon request, "the cost of the . . . transmission of electric energy by means of facilities under the jurisdiction of the Commission . . . ." Section 206, therefore, authorizes FERC to correct discriminatory wholesale rates and to assist the states in setting retail rates.

2. Enron's Claims Of A Regulatory Gap Are Baseless

Enron, ECRC and EPSA contend that FERC Order 888 allows a vertically integrated utility to discriminate against wholesale competitors by reserving large portions of the interstate grid for bundled retail transactions and leaving wholesale competitors with insufficient capacity (Enron at 41-43, ECRC at 19-20, EPSA at 6-10). Order 888, however, limits the ability of a utility to reserve transmission capacity for native load to levels needed to accommodate reasonable growth. J.A. 291, Enron App. 267a, FERC Order 888 at 31,745. If a utility unreasonably forecasts growth, and thereby foregoes revenue from wholesale customers, regulators may impute the foregone revenue to the utility for retail ratemaking purposes, leaving utility management answerable to shareholders. See Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 972 (1986) ["Without deciding this issue, we may assume that a particular quantity of power provided by a utility from a particular source could be deemed unreasonably excessive [by a state commission] if lower cost power is available elsewhere . . ."]; Rochester Gas & Electric Corporation v. Public Service Comm'n of the State of New York, 754 F.2d 99 (2d Cir. 1985) [upholding NYPSC imputation of incidental revenues from wholesale sales].

Enron's and EPSA's allegation that state commissions are unable to eliminate undue discrimination (Enron at 44, EPSA at 10) is also incorrect.[15] State regulators are

[15] Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377, 384 (1983) does not support Enron's argument that the FPA leaves a regulatory gap (Enron at 32-33).

authorized to (1) assure that retail transmission rates are "just and reasonable" (e.g., New York Public Service Law [NYPSL] § 65(1); (2) require utilities to provide services in a non-discriminatory manner (NYPSL § 65(3)); see also Idaho Code Section 61-315; (3) prescribe corrective behavior if a utility acts in "anywise in violation of any provision of law" (NYPSL § 66(6)); and (4) "order such improvement in the. . . transmission of electricity or in the methods employed by such person or corporation, as will in its judgment be adequate, just and reasonable" (NYPSL § 72).[16] Indeed, state regulatory agencies normally have "general supervision of all . . . electric corporations" and "all electric plants" and "all powers necessary or proper to enable it to carry out the purposes of" the Public Service Law (e.g., NYPSL §§ 66(1); 4(1)).

State law prohibits utilities from granting "an undue preference or advantage to any person, corporation or locality, or to any particular description of service (emphasis

In that case, the Court relied on the fact that retail utilities receive out of state power, "and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the states." 461 U.S. at 395. Here, of course, Enron is trying to limit state regulation of the very out-of-state transmission of energy on which the Court relied as a basis for its decision in Arkansas Electric Corp. Enron argues that Arkansas Electric Coop. Corp. shows Congress did not intend to leave the electric industry unregulated (Enron at 32-33, quoting 46 U.S. at 384). The Court relied upon that principle to reject claims like Enron's that states were preempted.

[16] The New York Public Service Law is illustrative of state power to address discrimination. Other states have very similar grants of jurisdiction.

added)"; (e.g., NYPSL § 65(3); New York General Business Law § 340 et seq. (precluding monopolies)). Utilities, therefore, may not grant themselves preferences (NYPSL § 2(13)). See Matter of Energy Ass'n of New York State v. Public Service Commission of the State of New York, 169 Misc. 2d 924, 932-36, 653 N.Y.S. 2d 502, 510-512 (Albany County 1996). See also, Case 94-C-0095, Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, Opinion No. 96-13, Opinion and Order Adopting Regulatory Framework, New York Public Service Commission, 1996 N.Y. PUC LEXIS 270 [A 39]; 171 P.U.R. 4th 30, 43 (issued May 22, 1996) [discussing imputation guidelines for comparing retail and wholesale prices]; Case 89-C-099, Applicability of Common Carrier Concept to Modern Telecommunications; Opinion No. 90-9, Opinion and Order Adopting Regulations Concerning Common Carriage, New York Public Service Commission, 1990 N.Y. PUC LEXIS 4; 110 P.U.R. 4th 107 (issued February 20, 1990).

Additional state commission tools for avoiding anti-competitive utility behavior include conditioning discretionary rates on non-preferential use of utilities' transmission networks and acting on complaints of customers seeking the delivery of competitors' electricity. New York ex rel. Woodhaven Gas Light Co. v. Public Serv. Comm'n, 269 U.S. 244, 248 (1925) [upholding the state's power to require utilities to extend services for legitimate public purposes]; California v. ARC America Corp., 490 U.S. 93, 103 (1989) [rejecting claims that state antitrust laws are preempted by federal law because "[i]t is one thing to consider Congressional policies . . . in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as

defining what federal law allows states to do under their own antitrust law"]. See Younger v. Jensen, 26 Cal. 3d 397, 605 P.2d 813 (1980) [state antitrust investigation against regulated entities].

Rather than simply reacting to claims of discrimination, state commissions have also acted to discourage discriminatory use of retail transmission service. New York State, for example, has removed utility incentives to use the delivery system in a discriminatory manner by inducing the sale of nearly all utility-owned power plants.[17]

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[17] Cases 96-E-0900, 94-E-0098, 94-E-0099, 96-E-0891, 96-E-0897, 96-E-0909 - Orange & Rockland Utilities, Inc., Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation, Consolidated Edison Company of New York Inc., Central Hudson Gas & Electric Corporation, - Plans for Electric Rate Restructuring, Statement of Policy Regarding Vertical Market Power [encouraging divestiture], 1988 N.Y. PUC LEXIS 432; 187 P.U.R. 4th 223 (July 17, 1998). See also New York Orders approving divestiture plans. Case 96-E-0909, Central Hudson Gas & Electric Corporation - Plans for Electric Rates and Restructuring - Order Authorizing the Process for the Auctioning of Generation Plan and Modifying Prior Orders, 2000 N.Y. PUC LEXIS 93 (issued February 23, 2000); Case 96-E-0897, Consolidated Edison Company of New York. - Plans for Electric Rates and Restructuring, Order Authorizing the Process for the Auctioning of Generation Plant, 1998 N.Y. PUC LEXIS 414, 188 P.U.R. 4th 149; Case 96-E-0891, New York State Electric & Gas Corporation - Plans for Electric Rates and Restructuring, Order Authorizing the Process for the Auctioning of Generation Plant (1998 N.Y. PUC LEXIS 192 (issued April 24, 1998); Cases 94-E-0098 and 94-E-0099, Niagara Mohawk Power Corporation - PowerChoice Rate and Restructuring Plan, Order Authorizing Process for the Auctioning of Generating Facilities, 1998 N.Y. PUC LEXIS 259 (issued May 6, 1998); Case 96-E-0900, Orange and Rockland

With states serving as regulatory laboratories, retail competition is gradually taking root. See Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 788 (1982) ["Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic and political ideas" (O'Connor, J. dissenting). See also, Connecticut Light & Power Co. v. Federal Power Comm'n, 324 U.S. 515, 529 (1945) [Congress thought it "wise to keep the hand of state regulatory bodies in this business, for the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment"].[18] If restructuring programs are to create a fair playing field for utility competitors while protecting energy consumers from potential rate shock, regulators must assess customer needs, the capabilities of transmission and distribution infrastructures, the "margins" available in unbundled retail rates and potential competitive interests in providing unbundled services. State regulators are closest to these questions and they are prepared to implement strategies to

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Utilities, Inc. - Plans for Electric Rates and Restructuring, Order Authorizing the Process for the Auctioning of Generation Plant and Rejecting Joint Agreement, 1998 N.Y. PUC LEXIS 259 (issued April 16, 1998); 1998 N.Y. PUC LEXIS 374.

[18] See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York (CC Docket No. 99-295), Memorandum Opinion and Order, FCC 99-404, ¶ 6, n. 5 (December 22, 1999) [FCC decision praising state innovations that opened the door to competition].

open markets in a meaningful, effective manner.[19] Their efforts to do so, however, have been impeded by "one-size-fits-all" regulation.

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[19] Case 98-M-0667, Electronic Data Interchange,Opinion No. 00-05, Opinion and Order on Implementation of Electronic Data Interexchange, New York Public Service Commission, 2000 N.Y. PUC LEXIS 411, 200 P.U.R. 4th 329 (April 12, 2000); Case 99-M-0631, Customer Billing Arrangements Alternative Billing Arrangements, New York Public Service Commission, Order Providing for Customer Choice of Billing Entity, 2000 N.Y. PUC LEXIS 283, 200 P.U.R. 4th 149 (issued March 22, 2000); Case 98-M-1343, Retail Access Business Rules, Opinion No. 99-3, Opinion and Order Concerning Uniform Business Practices, New York Public Service Commission, 1999 N.Y. PUC LEXIS 28, 190 P.U.R. 4th 369 (issued February 16, 1999), rehearing granted in part, 1999 N.Y. PUC LEXIS 95, (issued April 15, 1999); Case 94-E-0952, Competitive Opportunities Regarding Electric Service, New York Public Service Commission, Order Providing for Competitive Metering, 1999 N.Y. PUC LEXIS 280, 194 P.U.R. 4th 129 (issued June 16, 1999); Case 94-E-0952, Competitive Opportunities Regarding Electric Service, Opinion No. 97-13, Opinion and Order Establishing Regulatory Policies for Competitive Metering, New York Public Service Commission, 1997 N.Y. PUC LEXIS 450, 181 P.U.R. 4th 324 (issued August 1, 1997); Cases 94-E-0952 et al., Competitive Opportunities Regarding Electric Service, Opinion No. 96-12, Opinion and Order Regarding Competitive Opportunities for Electric Service, New York Public Service Commission, 1996 N.Y. PUC LEXIS 330, 168 P.U.R. 4th 515 (issued May 20, 1996).

POINT II

ENRON'S CLAIM THAT ALL TRANSMISSIONS ON THE INTERCONNECTED GRID ARE IN INTERSTATE COMMERCE IS IRRELEVANT AND, IN ANY EVENT, INCORRECT

The second principal argument of Enron's brief on the merits is that all retail transmissions on the interconnected grid are in interstate commerce. Enron's contention is irrelevant because, as indicated above, Congress assigned the states jurisdiction of all retail transactions, including retail transmissions in interstate commerce.[20] It is also, however, incorrect.[21]

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[20] Whether a transmission is interstate is, as discussed below, governed by § 201(c), which provides that energy is transmitted interstate if it is carried from one state and consumed in another state. The definition is relevant not for determining which services FERC may regulate (FERC regulates wholesale transmissions; the states regulate retail transmissions), but for deciding which companies fall within FERC's general jurisdiction (e.g., § 203 [review and security purchases], § 204 [review and security sales]). Owners of facilities that transmit energy in interstate commerce, irrespective of whether the transmissions are retail or wholesale, are "public utilities" under § 201(e), which governs the applicability of such sections as 203 and 204 and, are therefore subject to FERC's jurisdiction. Jersey Central Power & Light v. FPC, 319 U.S. 61, 73-74 (1943) ["although a company may be a public utility under subsection (e), all of its transactions do not thereby fall under the regulatory power of the Commission. . . . [201(a)'s] limitation is directed at generation, transmission and sale"].

[21] The State Petitioners' initial brief on the merits addressed this issue (Point II.B.C., pp. 36-46); this brief will respond to the Enron

A. The Interrelationship Of Transactions On The Grid Does Not Render Retail Transmissions Interstate

In contending that all retail transmissions are in interstate commerce, Enron assumes that all transactions affect the entire grid (Enron at 6, 7). Its assumption is arguably accurate, from a theoretical standpoint, but misleading to the extent Enron uses it to suggest that all, or most, transmissions cross state lines.

If a person on a boat in the Atlantic Ocean tosses a pebble into the water, the pebble will sink and a ripple of water will appear, but there will be no other consequences. In theory, however, consistent with Enron's argument on electricity flows, the pebble's entry into the water will cause water molecules, and energy, to ripple across the entire ocean. The theory is technically correct, but inconsequential to the person in the boat because, among other things, the water molecules surrounding the boat will not travel any measurable distance.

When a customer in New York City turns on a 60 watt lightbulb, the energy required to light the bulb is supplied by increases in output of nearby New York City generators. Electric Power Research Institute (EPRI), A Primer on Electric Power Flow for Economists and Utility Planners (1995), at 2-8, 3-2; J.A. 822-823; 829-830. R. Sarikas, Introduction to Electrical Theory and Power Transmission (1995), at 70. The reaction of distant electrons in the grid is immeasurable because electrical impedance (resistance), which directs the closest power on the grid to a load, also dictates that a load change at one point on the grid has no

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arguments that have not been answered.

appreciable impact on other areas of the grid. EPRI, supra, at 2-8, 3-2; J.A. 822-823; 829-830; Sarikas, supra, at 70.

Thus, contrary to Enron's claims (Enron at 6), all generation on the interconnected grid does not serve all customers on the grid. See B.M. Weedy, B.J. Cory, Electric Power Systems (1998) at 175 ["When large interconnected systems are linked electrically to others by means of tie-lines the power transfers between them are usually decided by mutual agreement and the power is controlled by regulators (devices that control the flow of power").]

B. Interconnections Since 1935 Are Not Relevant To The States' Jurisdiction Over Retail Transmissions

Enron alleges that although 47 states are interconnected today, only a "fraction of the nation's electric systems were interconnected" in 1935 (Enron at 7). "While in 1928, 10.7 percent of the power generated in the United States was transmitted across State lines, in 1933 more than 17.8 percent of all the energy generated in the United States flowed in interstate commerce — an amount greater than the entire amount generated in the country in 1913." 1935 Hearings on S. 1725 at 797. "Ryan-DeVane Memorandum." See also S.R. No. 74-621, at 17 (1935). Congress, therefore, understood the trend toward increased interconnections when it preserved the states pre-existing regulation of retail transmission. Inasmuch as increased interconnections since 1935 do not alter the FPA's language, they are not relevant to whether FERC may (or must) set retail transmission rates. See Arkansas Electric Coop. Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375, 384, n. 8 (1983) ["Congress sought to freeze its perception of Attleboro into law . . ."].

C. The 1935 Report Further Supports State Jurisdiction Over Retail Transmission Service

Enron (Enron at 30) alleges that a report to the 1935 Congress states that interconnection facilities were subject to FERC jurisdiction. Again, facilities may be subject to FERC's jurisdiction, but the retail service they provide is subject to state regulation. The 1935 Hearings noted that Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) distinguished a wholesale sale of energy across state borders, which could not be regulated by a state, from a transaction "by which gas or electric energy was transmitted across State boundaries but directly to consumers. In such a case it was held that the State in which consumption took place might regulate the rates." 1935 Hearings on H.R. 5423 at 96 (discussing Pennsylvania Gas Co. v. Public Service Comm'n, 252 U.S. 23 (1920)). Further, to the extent the cited report states that "the theory of State regulation may become obsolete" as a result of interconnections, it refers to a theory that the states may regulate the electric industry alone, without federal assistance. 1935 Hearings on H.R. 5423 at 77. ["[O]nce the industry begins to transcend State boundaries either by physical interconnections or by subtle business and financial affiliations the theory of State regulation may become obsolete. . . . attempts by the individual States to extend their laws to cover the holding-company system are met with more serious jurisdictional objections."]

D. The Case Law Cited By Enron Does Not Support Its Position

Enron argues that Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1972) stands for the proposition that all transmissions on interstate grids are

FERC-jurisdictional.[22] Florida Power & Light neither accepted nor rejected the theory that all generators on an interconnected grid provide a pool of interstate energy that services all load requirements throughout the grid (Enron 28, 30). The Court found it unnecessary to approve or disapprove an "analysis based upon unity of electromagnetic response" (404 U.S. at 461-62).

Enron also relies (Enron at 31) on a statement from Northern States Power Co. v. Federal Energy Regulatory Comm'n, 30 F.3d 177, 179 (D.C. Cir. 1994), that "[t]here is no way to determine what path electricity actually takes between two points or indeed whether the electricity at the point of delivery was ever at the point of origin." Congress addressed the possibility that electricity generated in one state and used in that state might take a path outside state boundaries. It provided in FPA § 201(c) that electricity would only be in interstate commerce if it was produced in one state and consumed in another state.

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[22] Enron relies upon Justice Douglas' dissent from the supposed result of Florida Power & Light that "the commingled method will now mean that every privately owned interconnected facility in the United States (except for those isolated in Texas) is within the [FERC's] jurisdiction." 404 U.S. at 471 (Douglas, J. dissenting). Justice Douglas, however, also noted "[a]ll that is involved here is an effort to make [Florida Power & Light] follow [FERC's] Uniform System of Accounts." 404 U.S. at 472-73 (Douglas, J. dissenting).

CONCLUSION

For the reasons indicated above, Enron's challenge to FERC's Orders 888 and 888-A should be rejected.

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